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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

THE STATES OF OHIO AND INDIANA, Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Clean Air Act, a State must prohibit emissions from within the State that "contribute significantly" to another State's failure to meet an air quality standard. This case involves the application of this statutory requirement to a situation where emissions in several upwind States contribute to air pollution in downwind States.

The question presented is whether, in this situation, U.S. EPA may define each State's "significant contribution" in terms of the relative costs of reducing that State's emissions, without regard to the amount of actual emissions that each State sends downwind.

PARTIES TO THE PROCEEDING

1. Petitioners Ohio and Indiana were petitioners in the court of appeals along with:

In No. 98-1497, State of Michigan, Michigan Department of Environmental Quality, and State of West Virginia, Division of Environmental Protection.

In No. 98-1596, Commonwealth of Virginia.

In No. 98-1615, State of Alabama, *ex rel* Bill Pryor, Attorney General.

In No. 98-1619, State of North Carolina.

In No. 98-1621, State of South Carolina.

In No. 98-1499, United Mine Workers of America.

In No. 98-1500, Appalachian Power Company, *et al.*, consisting of:

Appalachian Power Company;
Baltimore Gas and Electric Company (now referred to as Constellation Power Source Generation, Inc.);
Carolina Power & Light Company;
Central and South West Services, Inc.;
Central Power and Light Company;
Public Service Company of Oklahoma;
Southwestern Electric Power Company;
West Texas Utilities Company;
Central Illinois Light Company;
Central Illinois Public Service Company;
CINergy;
Columbus Southern Power Company;
Commonwealth Edison Company;
Consumers Energy Company;
Dayton Power and Light Company, The;
Detroit Edison Company, The;
Duke Energy Company;
Florida Power Corporation;
Illinois Power Company;

Indiana Michigan Power Company;
Jacksonville Electric Authority;
Kentucky Power Company;
Kentucky Utilities Company;
Louisville Gas and Electric Company;
Minnesota Power Company;
Monongahela Power Company d/b/a
Allegheny Power System, Inc.;
Northern Indiana Public Service Company;
Oglethorpe Power Corporation;
Ohio Power Company;
Ohio Valley Electric Corporation;
Oklahoma Gas & Electric Company;
Otter Trail Power Company;
PacifiCorp Electric Operations;
Plains Electric Generation & Transmission
Cooperative, Inc.;
Potomac Edison Company, The,
d/b/a Allegheny Power System, Inc.;
Potomac Electric Power Company;
Public Service Company of New Mexico;
Salt River Project;
South Carolina Electric & Gas Company;
Southern Company;
Alabama Power Company;
Georgia Power Company;
Gulf Power Company;
Mississippi Power Company;
Savannah Electric and Power
Company;
Tampa Electric Power Company;
Tucson Electric Company;
Union Electric Company;
Virginia Power;
West Penn Power Company
d/b/a Allegheny Power System, Inc.;
Edison Electric Institute;

National Rural Electric Cooperative Association; and

American Public Power Association.

In No. 98-1500, Duquesne Light Company.

In No. 98-1501, Midwest Ozone Group.

In No. 98-1502, West Virginia Chamber of Commerce.

In No. 98-1504, National Mining Association.

In No. 98-1518, West Virginia Manufacturers Association.

In No. 98-1556, City of Springfield, Missouri, through the Board of Utilities, d/b/a City Utilities of Springfield, Missouri.

In No. 98-1567, Kansas City Power & Light Company;

St. Joseph Light & Power Company;

The Empire District Electric Company;

Utilicorp United, Inc.;

City of Independence, Missouri; and

Associated Electric Cooperative, Inc.

In No. 98-1573, Indianapolis Power & Light Company.

In No. 98-1585, The Alabama Forestry Association, Inc., by and through its section, The Alabama Pulp and Paper Counsel.

In No. 98-1590, Dairyland Power Cooperative.

In No. 98-1598, South Carolina Public Service Authority d/b/a Santee Cooper.

In No. 98-1601, American Municipal Power-Ohio.

In No. 98-1602, Fort James Operating Company;

Gilman Paper Company;

Rayonier Inc.;

Savannah Electric & Power Company;

Southeast Paper Manufacturing
Company; and
International Paper Company.

In No. 98-1608, PP&L, Inc.

In No. 98-1609, Council of Industrial Boiler Owners.

In No. 98-1611, Network for Workable Air Policies.

In No. 98-1616, Georgia Coalition for Sound Environmental Policy, Inc.

In No. 98-1618, Interstate Natural Gas Association of America.

In No. 99-1070, Appalachian Power Company, *et al.*

In No. 99-1093, Wisconsin Paper Council;
Madison Gas and Electric Company;
Northern States Power Company;
Wisconsin Public Service
Corporation; and
Wisconsin Manufacturers & Commerce.

2. The single respondent in the court of appeals was the United States Environmental Protection Agency.

3. The following parties intervened in the court of appeals:

State of Wisconsin;
Virginia Manufacturing Association;
Detroit Public Lighting;
GPU Generation, Inc.;
American Gas Association;
Michigan Manufacturing Association;
State of New York;
State of Connecticut;
State of Maine;
State of Maryland;
State of New Hampshire;
Commonwealth of Massachusetts;

Commonwealth of Pennsylvania;
State of Rhode Island;
State of Vermont;
New England Council;
Natural Resources Defense Council;
Province of Ontario, Canada;
Environmental Law and Policy Center of the Midwest;
Clean Air Task Force;
Consolidated Edison Co. of New York, Inc.;
Natural Gas Supply Association;
Associated Industries of Massachusetts;
New Jersey State Chamber of Commerce;
Pennsylvania Power & Light;
American Lung Association of Metropolitan Chicago;
Appalachian Power Company, *et al*;
Dairyland Power Cooperative;
South Carolina Public Service Authority d/b/a Santee Cooper;
Grand Haven Board of Light and Power;
Holland Board of Public Works;
Lansing Board of Water and Light;
Marquette Board of Light and Power;
Michigan South Central Power Agency;
City of Wyandotte Department of Municipal Service;
Interstate Natural Gas Association of America;
Network for Workable Air Policies;
Business Council of Alabama;
KeySpan Generation LLC;
Niagara Mohawk Power Corporation;
PECO Energy Company;
Public Service Electric and Gas Company;
Rochester Gas & Electric Corporation;
PG & E Generating;
Sempra Energy;
Atlantic City Electric Company;

Delmara Power & Light Company;
Appalachian Mountain Club;
Citizens Action Coalition of Indiana, Inc.;
Clean Air Council;
Environmental Defense Fund;
Group Against Smog and Pollution;
Hoosier Environmental Council;
Illinois Environmental Council;
Izaak Walton League of America;
Legal Environmental Assistance Foundation;
Michigan Environmental Council;
National Environmental Trust;
Natural Resources Council of Maine;
New York Public Interest Research Group;
Ohio Citizen Action;
Ohio Environmental Council;
U.S. Public Interest Research Group;
Wisconsin's Environmental Decade Institute;
Norman W. Sterling, Minister of the Environment, Province of Ontario;
Charles A. Harnick, Attorney General of Province of Ontario; and
Christopher Carl Haromy.

4. The following parties appeared as *amici curiae* in the court of appeals:

Government of Canada
South Carolina Chamber of Commerce;
North Carolina Citizens for Business and Industry;
Toledo Metropolitan Area Council of Governments;
Environmental Management Association of South Carolina; and
South Carolina Manufacturers Alliance.

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PETITION FOR A WRIT OF CERTIORARI

The States of Ohio and Indiana respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

In a separate petition, filed on September 20, 2000, various industry parties seek review of the same judgment, *Appalachian Power Co., et al. v. U.S. Environmental Protection Agency,* No. 00-445, and we anticipate that another petition will be filed simultaneously with this one, on behalf of several other States, including Michigan.

OPINIONS BELOW

The opinion of the court of appeals is reported at 213 F.3d 663, and is printed in the Appendix to the Petition in No. 00-445 (hereinafter "No. 00-445 App.")

JURISDICTION

The decision of the court of appeals was entered on March 3, 2000. A rehearing petition was denied on June 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Upon motion of the State of Michigan, on behalf of itself, Ohio, Indiana, and several other petitioning States, this Court granted the petitioning States an extension until October 20, 2000, within which to file their petitions for a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

The relevant sections of the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, namely Section 110(a)(2)(D) and 110(k)(5), 42 U.S.C. § 7410(a)(2)(D) and § 7410(k)(5), respectively, provide:

§7410(a)(2). Each implementation plan submitted by a State under this Act shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

* * *

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this title, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, ...

§7410(k)(5). Calls for plan revisions. Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 176A or section 184 [42 USCS § 7506a or 7511c], or to otherwise comply with any requirement of this Act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies . . . .

The EPA rule at issue in this case has been lodged with the Court by Petitioners in No. 00-445.

STATEMENT

This petition, like the others filed seeking review of the same judgment, concerns the problem of pollution migrating downwind from midwestern, southeastern and northeastern States to other, primarily northeastern, States. The United States Environmental Protection Agency (EPA) has issued a rule requiring 22 States and the District of Columbia ("23 States")[1] to revise their plans to reduce emissions of nitrogen oxides (NOx), because of the effect that they have downwind on the level of ozone in the air.[2] Eight of these 23 States, including Ohio and Indiana, sought review of this EPA rule in the court of appeals on the ground that EPA's method for determining how much each State should reduce its NOx emissions was premised on an incorrect interpretation of the Clean Air Act.

The relevant provision of the Act requires that each State prohibit emissions within the State that "contribute significantly" to another State's failure to meet an air quality standard adopted by EPA. 42 U.S.C. § 7410(a)(2)(D)(i)(I). The Act further authorizes EPA to require States to submit plans "necessary" to achieve an

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[1] The court of appeals vacated the EPA rule as to three of the 23 States, Wisconsin, Missouri, and Georgia. The remaining nineteen states, plus the District of Columbia, are Alabama, Connecticut, Delaware, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, and West Virginia.

[2] Nitrogen oxides combine with another pollutant, volatile organic compounds, in the presence of sunlight to form ground level ozone, or "smog." This ground level ozone pollution differs from the problem of the ozone hole in the upper atmosphere.

adequate mitigation of this pollution. *Id.* § 7410(k)(5). EPA, however, interpreted these provisions to permit, when several States combine to cause pollution downwind, a definition of each State's "significant contribution" in terms of a single standard of how expensive it would be to reduce these emissions, without regard to the actual level of emissions sent downwind by each State.

To be specific, in promulgating its NOx rule, EPA stated that, before considering cost-effectiveness, it first considered several "air quality" factors. 63 Fed. Reg. at 57376 (lodged with the Court by petitioners in No. 00-445). In doing so, the EPA modeled the amount of emissions flowing downwind from the upwind States. This modeling showed that some upwind States have much less effect on downwind pollution than other upwind States, in both the amounts of NOx pollutants they contribute and the frequency with which such pollutants are contributed.[3]

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[3] One factor that EPA analyzed was the number of "parts" of ozone in a billion "parts" of air that an upwind State contributed to a downwind State as a result of the downwind flow of nitrogen oxides, an ingredient of ozone. The EPA standard for ozone is 125 parts of ozone in a billion parts of air. (Abbreviated as "125 ppb"). Analyzing four particular multi-day "episodes" when ozone pollution was particularly bad in the Eastern half of the United States, EPA generated statistics concerning the amounts of ozone (in parts per billion) that a given upwind State contributed to a downwind State and how often an upwind State contributed to a downwind State's failure to meet the EPA standard. For example, EPA found that Pennsylvania contributes at least 10 parts per billion of ozone to New York City during 91 percent of the times that New York City fails to meet the 125 ppb standard. In contrast, Indiana, under one analysis, contributed only 5 or more parts per billion of ozone and, under another analysis, contributed only 2 or more ppb of ozone, to only 4 percent of New York City's failures to meet the 125 ppb national standard. *Air Quality Modeling Technical Support Document for the NOx SIP Call*, U.S. EPA,

Using these data, EPA identified 23 States that contribute emissions to the failure of one or more downwind States to meet the national ozone standard. EPA found downwind emission from these 23 States to be in amounts "large and/or frequent enough to be of concern." *Id.* at 57381, 57390-57398. In fact, as the court of appeals itself stated (213 F.3d at 675), EPA used a "very low threshold" to include a State in its group of twenty-three contributors.[4]

For the critical steps of determining each State's "significant contribution" to, and "necessary mitigation" of, downwind pollution, however, EPA chose a factor other than air quality. EPA instead considered the cost-effectiveness of pollution control measures and

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Office of Air and Radiation, September 23, 1998 ("the TSD"), at p. C-13, C-14. Joint Appendix of Industry Petitioners before the Court of Appeals, Vol. 3, at 1048, 1156, 1157.

Another statistic that EPA generated was the percentage that upwind States contributed to the total amount of ozone *above* the 125 ppb standard during the four episodes. Using the New York City example again, Indiana contributes 1 percent to the total above 125 ppb, Ohio contributes 4 percent of the total above 125 ppb and Pennsylvania contributes 18 percent of the total above 125 ppb. By comparison, local sources contribute 55 percent of the total above 125 ppb (and, by definition of the statistic, 100 percent of the amount of ozone leading up to the 125 ppb standard). *See* 63 Fed. Reg. at 57,391-2.

[4] The threshold was a "magnitude" of contribution of 2 parts per billion of ozone considered in conjunction with "frequency" of contribution and "relative amount" of the contribution. For example, North Carolina was included in the group of States significantly contributing to New York City's ozone problem because it contributed 2 parts per billion of ozone to 2 percent of the times that New York City failed to meet the 125 parts per billion standard, and because it contributed 3 percent of the total amount of ozone in New York City that exceeded the EPA standard. *See* 63 Fed. Reg. at 57,392-3.

determined that, for each of these 23 States, its "significant contribution" to downwind pollution was the amount of emissions it could reduce by "highly cost-effective control measures." Specifically, regardless of the relative contributions of each of the 23 States, each State was required to make reductions in NOx emissions that could be accomplished for an average cost of $2000 per ton or less. *See* 63 Fed. Reg. at 57,377.

In the court of appeals, Ohio and Indiana (among many others) challenged EPA's methodology as inconsistent with the Act. The court, however, held otherwise.

The majority of the court of appeals found that "the fundamental dispute is over the clarity of the phrase 'contribute significantly.'" 213 F.3d at 677. The court stated that the term "significant" is not a one-dimensional term that limits EPA's consideration to health factors, but a term that allows consideration of cost-effectiveness as well. Further, the lower court stated that an agency was not barred from considering costs absent a "clear congressional intent to preclude consideration of cost." Finding that Section 110(a)(2)(D)(i)(I) of the Clean Air Act did not prohibit consideration of costs, the majority concluded that EPA could consider costs. 213 F.3d at 677, 679.

Addressing the implications of its decision, the majority recognized the fact that "where two states differ considerably in the amount of their respective NOx contributions to downwind nonattainment, under the EPA rule even the small contributors must make reductions equivalent to those achievable by highly cost-effective measures." *Id.* at 679. Even more to the point, a State with a relatively small level of actual emissions flowing downwind, and whose emissions are relatively inexpensive to mitigate, will be required by the EPA rule to bear a disproportionately high share of the clean-up

cost. Acknowledging this point, the majority observed: "[T]he ultimate line of 'significance,' whether measured in volume of NOx emitted or arriving in nonattainment areas, would vary from state to state depending on variations in cutback costs." *Id.* at 675. The majority, however, dismissed this objection by stating, when it upheld EPA's line-drawing on the basis of cost differential, that its decision "logically entail[ed] upholding this consequence." *Id.*

In his dissent, Judge Sentelle found that the EPA impermissibly substituted its own notions of cost effectiveness in place of the mandated Section 110(a)(2)(D)(i)(I) determination of "significant contributions." He noted that EPA did not apply the factors most logically relevant to identifying a significant contribution, and he found no basis for using cost effectiveness as the pivotal factor in applying the "significant contribution" mandate. *Id.* at 695-97 (Sentelle, J., dissenting).

Petitioners filed a joint petition for rehearing and rehearing *en banc* with the court of appeals. On June 22, 2000, the court denied both requests, with Judge Sentelle, voting in favor of the petition's requests.

REASONS FOR GRANTING THE PETITION

I. The Question for Review is One of Great National Importance.

The problem of air pollution in a downwind State, caused in part by emissions in upwind States, is an issue of obvious significance to the Nation as a whole. Interpreting correctly how the Clean Air Act apportions responsibility among upwind States for their share of downwind pollution is, consequently, a legal issue of pressing national concern, warranting review by this

Court. This issue of statutory interpretation, moreover, has yet to be addressed by this Court.

Ours is a federalist system, and the structure of the Clean Air Act is predicated on this premise. In both *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), and *Union Electric Company v. Environmental Protection Agency*, 427 U.S. 246 (1976), this Court has recognized the critical role to be played by the individual States in the implementation of the Clean Air Act, and the relative roles of the States and the U.S. EPA under the Act is also implicated by the issues under consideration in the two *American Trucking* cases scheduled for oral argument before this Court on November 7, Nos. 99-1257 and 99-1426. (In particular, the so-called "Subpart 2" issues in No. 99-1257 affect the authority of States to implement ozone reduction as intended by Congress.) This case now even more squarely implicates the appropriate share of responsibility each State bears for redressing the portion of the national air-pollution problem that its local activities have caused.

We do not deny that emissions that migrate downwind and cause pollution in other States create a problem that spills over state boundaries and requires a federal solution. But the question in this case is whether Congress, in enacting the Clean Air Act and its amendments, intended that the federal solution to this problem be one that ignores the significance of State boundaries.

EPA has interpreted the Act to permit it to identify contributing upwind States using a nominal threshold, and then to require each State in the upwind group to reduce its emissions according to a single "cost-effective" standard that does not bear a relationship to how much each State actually contributed to the downwind pollution in the first place. But this solution, whatever its other virtues, disrespects federalism and

thus is contrary to the basic structure of the Clean Air Act itself. Rather than defining the required solution for a State in terms of the contribution to the air quality problem that originates from within the State's borders, EPA has defined the solution in terms of its own notions of cost-effectiveness and economic fairness. This approach, however, exceeds the scope of the agency's authority. Instead, EPA must adopt an interpretation of the Act that, first, apportions the responsibility for reducing emissions among the upwind States in accordance with each State's actual share of these emissions and, then, permits each State to adopt the most cost-effective means of achieving this reduction within that State.

Interpreting the Act to require this kind of federalism-sensitive solution has no detrimental effect on air quality in any State. Consistent with the Act, EPA has the authority to insist on an appropriate level of pollution reduction to be achieved in a downwind State and, further, to require the upwind States to curtail their emissions so as to achieve the necessary reduction of pollution in the downwind State. The only issue here is how this burden on the several upwind States will be allocated among these States. In accordance with basic principles of federalism, as well as the specific language of the relevant provision of the Clean Air Act, this burden should be apportioned among the upwind States according to how much emissions each State actually contributed to the problem downwind.

II. The Specific Language of the Act Supports a Federalism-Sensitive Interpretation.

The relevant provision of the Act states simply that each State shall prohibit "any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in . . . any other State with

respect to any [national air-quality standard]." 42 U.S.C. § 7410(a)(2)(D)(i)(I). This language, which specifically refers to *emissions* in *amounts* that "contribute significantly" to pollution downwind, speaks of these "significant contributions" in terms of actual levels of emissions. Thus, the primary factor in defining a State's "significant contribution" to a downwind problem should be the actual pollution that the State sent downwind.

It is true, as the court of appeals noted, that the term "significant" is inherently open-ended and is susceptible of an interpretation that would consider costs of reduction as one of several factors in measuring "contributions" that require a regulatory response. But, it must also be emphasized, the adjective "significant" as modifying the noun "contribution" can also be easily defined to mean *measurable* and *non-minimal* effects in a downwind State. This definition of significance would confine the term to physical considerations, in keeping with the focus of the statutory language on actual emissions in a particular State and the air-quality effect they produce downwind.

This point shows, not that a correct interpretation of "significant contribution" may be had by plain meaning analysis of these two words alone, but instead that the meaning should be settled by reference to the overall structure and purpose of the Clean Air Act. Guided by this broader inquiry, our argument is that a correct interpretation of the Act may not ignore the importance of State boundaries in the way that the EPA did. While the national priority must be to adequately mitigate the problem of interstate transport of pollution, this solution may be obtained in a way that allocates responsibility in accordance with each State's share of actual contribution to the problem, and the whole structure or purpose of the Act itself expects this kind of proportional solution.

The Act also specifically provides that, if a State's plan for redressing its "significant contribution" to a downwind problem is inadequate, then EPA may require the State to revise its plan "as necessary to correct such inadequacies." 42 U.S.C. § 7410(k)(5). This provision reasonably may be construed to permit cost-effectiveness to be a factor in selecting among methods to achieve the "necessary" reduction in the upwind emission levels that have caused the "significant contribution" to the downwind problem. Even so, a reasonable construction of the statute as a whole still requires that cost-effectiveness be a subordinate factor to the initial determination of how much each State must reduce its actual emissions levels in order to avoid "contribut[ing] significantly" to the downwind pollution.

EPA's contrary approach leads to several anomalous and unreasonable results. First, EPA's choice of how costs should relate to defining "significance" of a State's contribution is arbitrary and not tethered to the Act itself. As even the majority of the court of appeals recognized:

> [The EPA] neither rests that [$2,000-per-ton] benchmark on anything in the language or function of § 110(a)(2)(D)(i)(I), nor otherwise explains why the resulting cut-off point represents the right degree of "cost-effectiveness" (i.e., why "highly cost-effective" should be at that "height"). Accordingly, we must read the EPA as having understood that its selection of the cut-off point was essentially unbounded.

213 F.3d at 680. EPA's statement that the reductions are not "overkill" because *collectively* the reductions are not more than necessary to ameliorate downwind nonattainment, 63 Fed. Reg. 57,379, 57,403, 57,440, does

nothing to address the arbitrary, unbounded nature of the determination on a State-by-State basis.

EPA's use of the cost-effectiveness standard leads to marginally-contributing States being faced with huge pollution control costs for marginal air-quality benefits. For example, EPA determined that both Indiana and Pennsylvania contributed to New York's failure to meet the national standard that air should not contain more than 125 "parts" of ozone per billion "parts" of air. Under EPA's cost-effectiveness standard, each State must install $2000-per-ton pollution control measures. Yet, when the amount of ozone pollution above the national standard is analyzed, Indiana contributes only 1 percent of the amount and Pennsylvania contributes 18 percent of the amount. *Id.* at 57,391-2.

Another study shows that if Indiana imposes *no* additional controls, it will contribute an average of 2.1 parts of ozone to a billion parts of air in New York City in 2007, the year that EPA looked to as the target year for ozone reductions to occur under its NOx rule. If, however, Indiana imposes all of the controls required by EPA, the modeling predicts Indiana's contribution to New York City will average 1.7 parts per billion of ozone. *Assessment of the Contribution of Emissions from Northern OTAG States on Elevated Ozone Concentrations,* prepared for the Southeast Michigan Council of Governments, *reproduced in* Joint Appendix of Industry Petitioners before the Court of Appeals, Vol. 5, at 2021, 2036a.[5] Under the same study, Pennsylvania will contribute an average of 21.38 parts per billion of ozone before the $2000-per-ton controls and an average of 18.86 parts per billion after. *Id.*

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[5] EPA never performed any State-by-State modeling that shows the contributions of upwind states after its rule is implemented.

Two points result from this comparison. First, installation of controls in Indiana yields a nominal projected 0.4 parts-per-billion reduction in ozone in New York City compared to a projected 2.52 parts-per-billion reduction of ozone as a result of installation of controls in Pennsylvania. Controls in Pennsylvania would therefore have a more than six-fold greater effect on New York City than the same controls in Indiana according to this study. Second, because Pennsylvania would have installed "highly cost-effective controls," EPA would consider Pennsylvania's after-control level of 18.86 parts per billion of ozone to be an *insignificant* contribution. This is in comparison to a pre-control level of 2.1 parts per billion in Indiana that is considered by EPA a *significant* contribution. Thus, a relatively large contribution of ozone is considered insignificant under EPA's standard, while a nominal contribution of ozone is considered significant.[6]

There is an even broader point. Under EPA's approach, an upwind State that contributes a relatively large amount of pollutants downwind, but whose pollution happens to be particularly expensive to clean up, may escape having to bear a proportionate share of the clean-up costs. In other words, although it caused more of the problem, this State may be asked to sacrifice comparatively less to achieve the solution. EPA might argue that from a policy perspective it makes sense to adopt a single overall clean-up method, without regard to State boundaries or who caused the problem. But this

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[6] Of course, Indiana has an effect on other downwind non-attainment areas besides New York. But, under the correct interpretation of the statute, Indiana's responsibility for NOx reductions should be based on the actual amounts of contributions to the ozone problems in New York or another State, not on an amount calculated by a cost-effectiveness standard disconnected from the actual contribution.

policy approach is not what the Act contemplates. Instead, the Act is structured to require each State and its industries to bear their share of the clean-up costs, in proportion to the extent that they actually contributed to the problem in the first place. While each State may reduce its own emissions as inexpensively as possible, no State may evade its share of responsibility simply because it is cheaper to reduce overall emissions elsewhere. As long as the downwind problem is to be solved—as the Act requires—then it was an appropriate judgment for Congress to make that each State will contribute to the solution in proportion to its contribution to the problem. Whatever its preferred policy approach, EPA is not entitled to overrule this congressional judgment.

III. A Federalism-Sensitive Interpretation of the Act is Consistent with the Proper Resolution of the Question Pending in *American Trucking Associations v. Browner*.

In *American Trucking Associations v. U.S. EPA*, 195 F. 3d 4 (D.C. Cir. 2000), *cert. granted*, No. 99-1257 (May 22, 2000) and No. 99-1426 (May 30, 2000) *(ATA)*, the State of Ohio, like many other parties, is urging the Court to adopt an interpretation of the Act that permits EPA to consider costs, as well as benefits, when setting an air-quality standard. Specifically, in *ATA*, we argue that, at least with respect to "non-threshold" pollutants (for which there is no health-related reason for a permissible level above zero), consideration of costs, as well as benefits, is necessary to enable EPA to articulate an intelligible basis for choosing a particular level of permissible emissions as the controlling national standard. As we observe in our briefs in that case, the language of the Act (Section 109 specifically) is susceptible to this reasonable, common-sense interpretation, which has the added virtue of avoiding a constitutional challenge to the Act on "non-delegation" (and perhaps also due process) grounds.

The federalism-sensitive interpretation of the Act that we propose here is consistent with the interpretation of the Act we advance in *ATA*. In both cases, we argue that considerations of cost-effectiveness should be a secondary factor, subordinate to primary considerations identified in Act, namely health-related factors under Section 109 and air-quality factors under Section 110. When EPA sets a national air-quality standard under Section 109, public health should be the primary consideration (in keeping with the overall purpose of the Act), but costs should be a permissible secondary consideration insofar as considering health benefits alone is necessarily indeterminate and untenable. Likewise, when EPA determines how much each State must reduce its emissions that "contribute significantly" to downwind pollution, the primary factor should be the actual amount of emissions that each State sends downwind, with cost-effectiveness a secondary consideration, to determine how each State will achieve the reduction necessary to rectify its share of the problem.[7]

This construction of the Act should not be difficult to understand or implement. The idea of one factor having a priority over another (subordinate) factor in a decision-making process is well-established. *Cf.* John Rawls, *A Theory of Justice* (1971) (arguing that liberty should have a priority over utility). Here, we argue that, properly construed in light of the Act's basic structure and purpose, Section 110 should be construed to require EPA, first, to identify (to the extent feasible) the measurable effect that each State has on downwind pollution, and then require each State to reduce it emissions in proportion to its share of the overall measurable effects. After making this calculation, EPA then may consider cost-effectiveness in requiring each State to adopt the

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[7] We wish to make clear that we do not argue that costs cannot be considered at all when EPA assesses the adequacy of a State's plan for reducing NOx emissions.

most efficient means of pollution reduction within its borders. This two-step decision-making process is neither unintelligible nor unreasonable in light of the overall structure and purpose of the Act. Rather, it is EPA's interpretation, which permits States with large downwind emissions to avoid a proportional share of the clean-up costs, that is unreasonable given the inherent federalist premises of the Clean Air Act.[8]

IV. The Question Here Requires This Court's Review.

The novel question of statutory construction that this case presents is of a magnitude and scope as to require this Court's review. Moreover, the case finds a number of States lined up on either side of the issue, as some States benefit from one interpretation while other States from another. This kind of dispute among several States is a category of case in which the Framers anticipated that this Court would exercise jurisdiction. (It only adds to the case that an agency of the United States is also directly involved in this dispute among the several States.)

The Constitution, in Article III, specifies that this Court has original jurisdiction in those cases where a State is a party. While this original jurisdiction is non-exclusive and, here, the court of appeals clearly had jurisdiction to review EPA action under 42 U.S.C. §7607(b), the character of this case and the analogy of original jurisdiction indicate that it is an appropriate case for the exercise of certiorari jurisdiction. In particular, the specific problem of interstate transport of pollution, as well as the fact that States are opposed to one another

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[8] Because of the relationship between the question of statutory interpretation in this case and the issues in *ATA*, the Court may wish to defer consideration of this petition as well as the others in this case until it has issued its decision in *ATA*.

concerning the allocation of responsibility for solving this problem, distinguishes this case from many questions arising under the Clean Air Act. While other issues under this Act may be left to the court of appeals, this one deserves the plenary review of this Court.

Indeed, throughout the Nation's history, disputes among the States concerning borders and natural resources have been a primary category of case in which this Court has exercised its original jurisdiction. *See* R. Stern *et al.*, *Supreme Court Practice* 462 (7th ed. 1993). The dispute in this case—concerning the flow of air pollution downwind from some States to another—is a modern-day version of the border and natural-resource disputes for which this Court's original jurisdiction was designed. When this point is added to the fact that the question presented here is a general and novel one of statutory interpretation, rather than being simply the application of settled precedents to a particular fact pattern, it is evident that this case is especially deserving of this Court's review.[9]

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[9] It would be consistent with this point if the Court determines that the question in this case would benefit, at least initially, from further consideration by the court of appeals in light of the interpretation of the Clean Air Act that this Court renders in *ATA*, and on this basis vacate and remand the court of appeals' decision.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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